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No. 06-939

In The
Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

EDMUND G. BROWN JR., in his capacity as Attorney General of the State of California, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA IN SUPPORT OF PETITIONER

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BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This amicus curiae brief is submitted by Associated Builders and Contractors of California, Inc. ("ABC California") in support of Petitioner United States Chamber of Commerce. Petitioners and Respondents to this action have, through their counsel of record, each consented to ABC California's filing of this brief.*

I. INTEREST OF AMICUS CURIAE

ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA, Inc. ("ABC California") is a California nonprofit trade association that represents its five individual California Chapters (Golden Gate, Southern California, San Diego, Los Angeles/Ventura and Central), the California and federally approved apprenticeship and craft training programs they sponsor, and the more than 1200 predominantly open shop (non-union) individual construction company members. Among these member companies are general contractors and subcontractors that perform construction, alteration, demolition, installation, or repair work done under contract for California state agencies and for local governments and private developers that receive state financial assistance such as grants or loans.

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* The letters of consent have been filed in the office of the Clerk. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the amicus curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

ABC California, which is affiliated with, but is managed independently, fully supports the amicus brief filed in this action by Associated Builders and Contractors, Inc.'s national organization ("ABC National"), a joint filing with other national organizations. ABC California's separate amicus brief in support of the Petition is intended to make the Court aware of ongoing efforts by California unions to use their statewide political influence to establish pro-union labor policies in conflict with the National Labor Relations Act through improperly regulating labor policy through manipulation of state and local government spending.

ABC California and its member chapters have played a central role in the litigation concerning the core issue presented by this case for nearly two decades. Of these numerous actions, the one of most direct relevance was the role of ABC California's member chapter(s) as an amicus and a party in *Chamber of Commerce v. Bragdon,* 64 F.3d 497 (9th Cir. 1995) and its related case, *Associated Builders & Contractors, Golden Gate Chapter Inc. v. Baca,* 769 F.Supp. 1537 (N.D. Cal. 1991), aff'd sub nom., *Chamber of Commerce v. Bragdon,* 64 F.3d 497 (9th Cir. 1995). The gravamen of these cases, like the case at bar, concerns efforts by governmental entities to regulate labor relations in the guise of an ostensibly "neutral" stated public purpose.

In this context, ABC California acknowledges it has an obligation to provide this Court its unique historical perspective on the role of union advocacy legislation such as that challenged in this case and provide what we hope is a helpful context in understanding the evolution of case precedent to assist members of the Court in reaching a conclusion that review by certiorari is urgently required.

II. POSITION OF AMICUS IN FAVOR OF GRANTING THE WRIT

Petitioner ably states the reasons why the statute under challenge transgresses federal labor law and why a fundamental conflict exists which must be resolved between the Ninth Circuit's *en banc* decision and those of the Second and Seventh Circuits. Amicus ABC of California adopts and concurs thereto.

As amicus, ABC California believes that, based on its personal experience, this case represents a historical turning point in the evolving use of legislative means to provide a structural advantage to labor in union organizing in California. As at times the primary target of such efforts, and equally as often, the primary litigant in challenges to such efforts, ABC California asks the Court to take this case up to cure the illness at its roots, by affirming a narrow statement of the principle of "market participant" and reject broad regulatory enactments that undermine federally guaranteed rights.

III. ARGUMENT IN SUPPORT OF GRANTING THE WRIT

A. How We Got To Where We Are

1. The Evolution Of Labor Protectionist Legislation In California

The initial effort to utilize legislation to further union organizing in modern California law was local ordinances in two Northern California counties whose stated "neutral" purpose was, in aid of industrial safety, to require the payment of public works prevailing wages on purely private construction projects. These ordinances were styled as "regulatory" in nature and, as noted, the identified public

purpose was intended, from the beginning, to form the basis for the enactments. The tactic of mandating union contract prevailing wages was meant to control the market and market share on the large industrial and residential projects targeted by the ordinances.

In the *Baca* and *Bragdon* cases, the trial and appellate courts concluded that use of a public policy justification was inconsistent with the rights arising under federal labor and pension law, and held the statutes pre-empted. (*See Associated Builders & Contractors, Golden Gate Chapter Inc. v. Baca, supra,* 769 F.Supp. at pp. 1544-1551; *Chamber of Commerce v. Bragdon, supra,* 64 F.3d at p. 504.)

B. Nothing Has Changed

1. "Neutrality Is A Myth"

The antithesis of public regulation is private contract. Out of this perspective was born the next effort by organized labor to advance its market share in the form of the so-called "project labor agreement." These agreements, executed between a government entity and a group of labor unions, were, like the private prevailing wage ordinances, creatures of the construction labor marketplace. The concept behind them was to avoid characterization as general regulation at all costs and, instead, to seek validation in the courts as private agreements, made by a municipality as if it were a private participant in the economic marketplace, for its own purposes. In this context, what is most striking about the *en banc* decision of the Ninth Circuit is that all pretense of drawing out the analytical difference between public "regulation" and

private "agreement" has been abandoned. (*Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1084 (9th Cir. 2006).)

"Market participation" means free play of economic forces can only occur in the context of federally guaranteed rights without a preemptive effect where the regulatory decision is negotiated case-specific action taken by an entity, notwithstanding that, independently, it might otherwise seek to act as a regulator. Therefore, if a Court, as the Ninth Circuit did, concludes that the "market participant" exception does not apply, it necessarily concludes that federal labor law preemption does. This was the gravamen of the Ninth Circuit's decision in *Bragdon*, and is, it is submitted, the better view.

In truth, it is made plain in the opinion below that the Ninth Circuit, after two contrary decisions of previous panels of the Court, now believes the State of California, in enacting the statute at issue, was exercising its "right to control allocation of tight resources." (*Lockyer*, *supra*, 463 F.3d 1076, 1095.) The problem, of course, is that there is no power of the purse inherent in the State of California where the effect of the "allocation of tight resources" is to limit federally guaranteed labor law rights.

IV. CONCLUSION

As argued by the Petitioner, and supported by the foregoing additional reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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